IN THE IOWA SUPREME COURT

APPELLATE NUMBER 15-0011

BERNARD J. WIHLM AND
PATRICIA M. BALEK

PLAINTIFFS-APPELLEES,

v.

SHIRLEY A. CAMPBELL, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF JOHN JOSEPH WIHLM AND AS TRUSTEE OF THE JOHN JOSEPH WIHLM REVOCABLE TRUST DATED APRIL 2, 2012 AND PARTIES IN POSSESSION,

DEFENDANT-APPELLANT.

APPEAL FROM THE IOWA DISTRICT COURT
OF CERRO GORDO COUNTY CASE NO. EQCV068660
AND FRANKLIN COUNTY CASE NO. EQCV501145
THE HONORABLE DEDRA L. SCHROEDER

FINAL BRIEF OF PLAINTIFFS-APPELLEES

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ROUTING STATEMENT

This case may be transferred to the Court of Appeals as it involves the application of existing legal principles. Therefore, it should ordinarily be transferred to the Court of Appeals. Iowa R. App. P. 6.1101(3)(a) (2015).

STATEMENT OF THE CASE

January 31, 2014, Plaintiffs Bernard J. Wihlm ("Wihlm") and Patricia M. Balek ("Balek") filed their Petition for Partition of Real Estate by Sale in Cerro Gordo County Case No. EQCV068660 and Franklin County Case No. EQCV501145. Appx. pp. 1-9, 10-13.

Campbell Shirley A. Campbell ("Campbell") filed her Answer to Petition for Partition of Real Estate by Sale and Jury Demand in Cerro Gordo County Case No. EQCV068660 March 12, 2014. Appx. p. 14. Campbell filed her Answer in Franklin County Case No. EQCV501145, along with a Jury Demand, March 31, 2014.

April 23, 2014, Wihlm and Balek filed a Motion to Strike the Jury Demand filed by Campbell in each of the matters. Appx. p. 16.

May 1, 2014, Wihlm and Balek filed a Motion to Consolidate Actions, seeking court authority to consolidate Franklin County Case No. EQCV501145 and Cerro Gordo County Case No. EQCV068660.

May 7, 2014, the trial court entered an Order granting the Motion to Strike Jury Demand. Supp. Appx. p. 1.

On the same date, the Court granted the Motion to Consolidate cases. Appx. p. 18.[1]

By Order filed May 13, 2014, a trial was scheduled for September 24, 2014. Appx. p. 21.

A bench trial, in which evidence was presented to the honorable District Court Judge Dedra L. Schroeder occurred September 24, 2014.

Subsequent to post-trial briefings, November 7, 2014, the Court entered its Decree, ordering a partition by sale at public auction and appointing Cory Behr of Behr Auction Services, LLC, as Referee. Appx. pp. 24, 32.

Campbell filed a Motion for Enlarged and Amended Findings of Fact and Conclusions of Law and Modified or Substituted Decree November 21, 2014. Appx. p. 34.

Campbell's Brief in support thereof was not filed until November 24, 2014. Appx. p. 39.

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[1] Although the trial court requested duplicative filings in each of the court files for purposes of avoiding duplication herein, all references will be documents filed in Cerro Gordo County Case No. EQCV068660 unless otherwise noted.

Wihlm and Balek filed their Resistance to the Motion for Enlarged and Amended Findings of Fact and Conclusions of Law and Modified Decree, and Brief in support thereof, December 1, 2014. Appx. pp. 52, 53.

On December 3, 2014, the Court denied Campbell's Motion to Enlarge and Amend Findings. Appx. p. 63.

Campbell filed a Notice of Appeal January 2, 2015. Appx. p. 66.

STATEMENT OF THE FACTS

Bernard J. Wihlm ("Wihlm") and Patricia M. Balek ("Balek"), Plaintiffs and Appellees, along with their sister Shirley A. Campbell ("Campbell"), are tenants in common to four parcels of real estate:

1. **THE SOUTH ONE-HUNDRED (S 100) ACRES OF THE NORTH ONE-HALF (N ½) AND THE NORTH SIXTY (N 60) ACRES OF THE SOUTH ONE-HALF (S ½) OF SECTION THIRTY-TWO (32), TOWNSHIP NINETY-FOUR (94), RANGE NINETEEN (19), WEST OF THE 5TH P.M., ALL IN DOUGHERTY TOWNSHIP, CERRO GORDO COUNTY, IOWA**

   by virtue of a Certificate to County Recorder of Change of Title dated April 19, 2005, and filed April

21, 2005, as Document No. 2005-3506, which was subject to a life estate in favor of John J. Wihlm,, who died November 17, 2012, as evidence by an Affidavit of Death Terminating Life Estate dated April 22, 2014, and filed April 22, 2014, as Document No. 2014-1964; and by virtue of a Trustee Warranty Deed dated April 21, 2014, and filed April 22, 2014, as Document No. 2014-1966. Appx. p. 80;

2. **A TRACT OF LAND IN THE S ½ OF SECTION 32, T94N; R19W OF THE 5TH P.M. IN CERRO GORDO COUNTY, IOWA, MORE PARTICULARLY DESCRIBED AS FOLLOWS: COMMENCING AT THE W ¼ CORNER OF SAID SECTION 32; THENCE SOUTH 497.75' TO A POINT OF BEGINNING; THENCE N89°24'E 3731.5'; THENCE S 01°15' E 396.0'; THENCE S 89°24' W 1100.0'; THENCE S 01°15'E 438.2'; THENCE S 89°34'W 2649.6'; THENCE NORTH 812.3' TO THE POINT OF BEGINNING – CONTAINING 60.3 ACRES.**

by virtue of a Certificate of Change of Title dated April 19, 2005, and filed April 21, 2005, as Document No. 2005-3505, which was subject to a life estate in favor of John J. Wihlm, which

terminated upon his death November 17, 2012, as evidenced by Affidavit of Death Terminating Life Estate dated May 22, 2013, and filed June 3, 2013, as Document No. 2013-3737. Appx. p. 89;

3. **THE EAST HALF (E ½) OF THE EAST HALF (E ½) OF THE SOUTHWEST QUARTER (SW ¼) OF SECTION SEVENTEEN (17), TOWNSHIP NINETY-THREE (93) NORTH, RANGE NINETEEN (19) WEST OF THE 5TH P.M., FRANKLIN COUNTY, IOWA**

by virtue of a Certificate to County Recorder of Change of Title dated April 19, 2005, and filed April 21, 2005, as Document No. 2005-0975, which was subject to a life estate in favor of their father, John J. Wihlm, which terminated upon his death November 17, 2012, as evidence by an Affidavit on Behalf of Remainderman dated July 1, 2014, and re-filed July 22, 2014, as Document No. 2014-1301. Appx. 95; and

4. **SOUTHWEST QUARTER (SW ¼) OF THE NORTHEAST QUARTER (NE ¼) OF SECTION THIRTY-THREE (33), TOWNSHIP NINETY-THREE NORTH (93), RANGE NINETEEN (19) WEST OF THE FIFTH (5) P.M., FRANKLIN COUNTY, IOWA**

by virtue of a Certificate of Change of Title dated April 19, 2005, and filed April 21, 2005, as Document No. 2005-0976, subject to a life estate in favor of their father, John J. Wihlm, which terminated upon his death November 17, 2012, as evidenced by an Affidavit of Death Terminating Life Estate dated May 22, 2013, and filed June 4, 2013, as Document No. 2013-1274. Appx. p. 99.

The parties collectively own 220 acres as tenants in common in Cerro Gordo County, which is depicted in Exhibits 10 and 11. Appx. pp. 307, 308.

The "south sixty" acre parcel as referenced by the parties throughout trial (depicted in Exhibit 11) is located adjacently to the south of the 160 acre tract (depicted in Exhibit 10). Appx. pp. 307, 308.

As shown in Exhibit 10, the north 160 acres in Cerro Gordo County includes an acreage consisting of approximately 4.4 acres. Appx. pp. 197, 213, 307.

The real estate located in Franklin County consists of two separate 40 acre parcels, which are not adjacent to one another. Appx. pp. 310-11.

The 40 acre parcel located in Section 17 of Franklin County includes approximately 17.27 acres of real estate enrolled in CRP, with the remaining real estate used as tillable crop land. Appx. pp. 310, 330-31 (Tr. pp. 15-16).

The 40 acre parcel in Section 33 of Franklin County includes a wooded area consisting of approximately 6.2 acres with the remaining 33.8 gross used as tillable crop land. Appx. pp. 311, 314.

Neither Wihlm, Balek, nor Campbell currently farm or previously farmed the real estate. Appx. p. 333 (Tr. p. 18). Rather, the parties have leased the real estate to the Anderegg family. Appx. p. 333 (Tr. p. 18).

Following the death of their father, Wihlm and Balek requested the sale of the real estate.

At trial, three experts testified:

i. Reed B. Kuper ("Kuper"), who is a licensed real estate broker (Supp. Appx. pp. 3-4);

ii. Cory Behr ("Behr"), an Auctioneer and a co-owner of Behr Auction Service, LLC (Trial Transcript pp. Supp. Appx. pp. 5-7); and

iii. Vernon Frederick Greder, Jr. ("Greder"), a licensed Appraiser, and owner of Benchmark Agribusiness, Inc. (Supp. Appx. pp. 8-9).

In the trial court's November 7, 2014, ruling, the trial court found each of the three experts to be sufficiently credentialed, knowledgeable, experienced, and credible in their testimony. Appx. p. 28 .

While Campbell stipulates to a partition, she requests that the partition be in kind. Appx. p. 425 (Tr. p. 197). The proposed partition in kind desired by Campbell is set forth in Exhibits 107 and 108. Appx. pp. 77-79. In short, Campbell requested the trial court award her three parcels located in Cerro Gordo County and depicted in Exhibits 107 and 108:

i. The south sixty acre parcel in Cerro Gordo County (also shown in Exhibits 11 and 25, at Appx. pp. 308, 324);

ii. The acreage located on the north 160 acres in Cerro Gordo County (Appx. p. 307); and

iii. 14.06+/- acres located east of the acreage, the boundary of which has never been established and cannot be depicted.

Appx. pp. 77-78, 79, 309, 234.

In support of her position, Campbell relied upon:

i. A 2004 appraisal of all 300 acres in Franklin County and Cerro Gordo County, offered as Exhibit 5;

ii. A 2013 appraisal for the 220 acres in Cerro Gordo County with an effective appraisal date of November 17, 2012, (the date of death of John J. Wihlm), offered as Exhibit 6; and

iii. A 2014 appraisal, with an effective date of July 16, 2014 for the two 40 acre parcels in Franklin County, offered as Exhibit 7.

Appx. pp. 104-190, 191-258, 259-305.

Attempting to address the staleness of the appraisals as of the September 2014 trial, Campbell offered an email of July 28, 2014, from Greder, with updated valuations as of that date. Appx. p. 72.

At trial, Behr and Kuper testified that given a number of then-present market conditions, the reliance upon an appraisal to partition the real estate in kind would be unwise and speculative. Appx. pp. 353-55, 365-66, 391-92, 397 (Tr. pp. 86-88, 98-99, 137-38, 143).

Throughout trial, numerous references were made to the corn suitability rating ("CSR") of real estate and its replacement rating system, referred to as "CSR2."

Behr explained the use of CSR and CSR2, both of which, in short, evaluate the production quality of the real estate. Appx. pp. 384-86 (Tr. pp. 130-32).

As explained by Behr, CSR2 values, which have superseded and replaced CSR values, are intended to be more precise in their assessment of the subject real estate than the outdated CSR valuations. Appx. pp. 384-86 (Tr. pp. 130-32).

The higher the CSR2 (or CSR) value, the better the quality of the real estate. Appx. pp. 384-86 (Tr. pp. 130-32).

One of the reasons Behr cautioned against the use of an appraisal for partitioning the real estate in kind is the stark variation in soil quality amongst the parcels. Behr described Campbell's proposed partition in kind as failing to "compare apples to apples." Appx. p. 397 (Tr. p. 143).

The varying qualities of soil referenced by Behr is exhibited in the CSR2 and CSR maps introduced as Exhibits 12, 15, 16, 23, 24, and 25. Appx. pp. 309, 312-13, 314-15, 322, 323, 324.

For example, the "south sixty" acre parcel located in Cerro Gordo County, which was desired by Campbell, has a CSR2 value of 88.7, while the 160 acres located to the north,

approximately 138 of which Campbell would have allocated to Wihlm and Balek, has a CSR2 value of 72.5.

As explained by Behr, the replacement of CSR with CSR2 has a significant impact on certain farms. Appx. pp. 384-86 (Tr. pp. 130-32).

This is exemplified by Exhibit 25, in which the "south sixty" acre parcel desired by Campbell has a CSR value of 81, but has a CSR2 value of 88.7. Appx. p. 324.

This is important because the appraisals upon which Campbell relies are based upon CSR rather than CSR2. Hence, if the valuation of the real estate is based upon a "per CSR point" versus a "per CSR2 point," drastic changes would result in the valuations.[2]

Kuper and Behr also cited a significant variance in grain prices between June 2014 and the trial as a reason not to rely upon an appraisal for partitioning the real estate in kind. Appx. pp. 349-52, 392-93 (Tr. pp. 80-83, 138-39), 318-21.

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[2] For example, if an appraiser assigns $102.00 to each CSR point for an acre of real estate having a CSR of 82, the per acre value would be $8,364.00. However, if that $102.00 is multiplied by the more accurate CSR2 of 88 for the same acre, the accurate value of the real estate is $8,879.00 per acre.

Factors identified by Behr and Kuper which impact the price for which somebody may purchase real estate at public auction also include "fence line buyers." Appx. pp. 355-56 (Tr. pp. 88-89). Kuper explained that a fence line buyer is an individual owning real estate adjacent to that which is being sold. Appx. pp. 355-57 (Tr. pp. 88-90). According to Kuper those individuals may have more incentive to purchase the real estate. Appx. pp. 355-56 (Tr. pp. 88-89).

Behr referenced the existence of timber, trees, woods, and a nearby river adjacent to one of the 40 acre parcels in Franklin County, and explained the negative impact this would have on the value. Appx. pp. 387-89 (Tr. pp. 133-35), 310.

Of perhaps most significance, Campbell concedes that the appraised value of the real estate that she would acquire under her proposed partition plan is likely lower than the actual fair market value. Appx. pp. 430-31 (Tr. pp. 206-07). When questioned by her own counsel, the following dialogue ensued:

Q: Could you explain to the Court what your interest is in proceeding with the division in kind rather than a division by sale.

A. I feel that I would be left out because the strong corporates surrounding our property, money is no object, and they would just outbid me, and I would be sitting with nothing.

Appx. pp. 425-26 (Tr. pp. 197-98).

This was reaffirmed by Campbell during cross examination:

Q. So--so really, what your telling me is your concern is that somebody else may pay more for the 60 acres than you would; right?

A. If they want to bid against me, yeah, I think.

Q. Is that a yes?

A. Yes, yes.

Q. And, consequently, if that were to happen, okay, if somebody else were to bid more than what the

appraised value is, okay, then the appraised value you've utilized is incorrect; right?

A. I guess, yes.

. . .

Q. Your concern is that at auction, somebody's going to bid more than you; correct?

A. Yes. They'll run it up.

Q. Run it up more than the appraised value?

A. Yes. Because about three miles north of us, it went for 14--Behr sold some property for 14.

Q. $14,000 an acre?

A. That was in the Globe Gazette.

Appx. pp. 430-31 (Tr. pp. 206-07).

In light of each of these factors, among others referenced below, Kuper and Behr advised that an appraisal cannot be used for purposes of accurately valuing the price for which real estate may be sold.

Even the appraiser, Greder, who Campbell called as a witness and relied upon, admitted that the current real estate

market "has become a whole lot less predictable." Appx. p. 412 (Tr. p. 174).

Greder also acknowledged that the sale price "is much more dependent now on who wants it." Appx. p. 412 (Tr. p. 174).

In light of the concerns resulting from unpredictability or speculative nature of using an appraisal to "carve up" the real estate, Wihlm and Balek requested that the trial court sell it by public auction. Appx. p. 342 (Tr. p. 40).

A sale would allow Campbell to purchase the real estate particularly desired by her at auction while ensuring that all parties benefit from receiving the highest and best price. According to Behr, who the trial court appointed as Referee, Campbell would have the opportunity to bid on a particular piece of real estate in the same manner as any other bidder. Appx. pp. 397-98 (Tr. pp. 143-44).

Even Wihlm acknowledged that Campbell would have the opportunity to bid, to which he expressed no objection. Appx. pp. 341-42 (Tr. pp. 39-40).

Following the presentation of the evidence, the trial court found that partitioning the real estate in kind would be "mere guesswork." Appx. p. 29.

The trial court appointed Behr to serve as Referee, and ordered that the real estate be sold at public auction. Appx. p. 32.

BRIEF POINT I.

THE APPELLATE COURT IS WITHOUT JURISDICTION DUE TO THE UNTIMELY FILING OF CAMPBELL'S NOTICE OF APPEAL.

Iowa Rules of Appellate Procedure 6.101(1)(b) and 6.102(2)(a) require the filing of a Notice of Appeal within thirty (30) days after the filing of the final order or judgment. Iowa R. App. P. 6.101(1)(b), 6.102(2)(a) (2014).

A valid motion filed pursuant to Iowa Rule of Civil Procedure 1.904(2) will delay the running of the thirty (30) days, until after the Court rules on the 1.904(2) motion.

Here, the Court entered its Decree November 7, 2014. Appx. pp. 24-33. Citing Rule 1.904(2), on November 21, 2014, Campbell filed a Motion for Enlarged and Amended Findings of

Fact and Conclusions of Law and Modified or Substituted Decree (the "Motion to Reconsider"). Appx. pp. 34-38. November 24, 2014, Campbell filed her Memorandum Brief in Support of the Motion to Reconsider. Appx. pp. 39-51.

The Brief in the Support of the Motion was filed untimely, as Iowa Rules of Civil Procedure 1.904 and 1.1007 require the motion to be filed within15 days of the trial court's ruling. Iowa R. Civ. P. 1.904, 1.1007 (2014).

December 1, 2014, Wihlm and Balek timely filed their Resistance to Campbell's Motion to Reconsider and their brief in support thereof. Appx. pp. 52-62.

A motion to reconsider is improper if it merely rehashes issues decided adversely to Campbell's desires. Sierra Club Iowa Chapter v. Iowa Dep't. of Transp., 832 N.W.2d 636, 641 (Iowa 2013) (citations omitted).

However, Campbell's Motion to Reconsider, and brief in support thereof, do nothing more than rehash legal issues raised and decided adversely to Campbell.

Campbell's Motion to Reconsider did not raise legal issues which the Court failed to address.

Rather, it merely asked the Court to overturn its previous decision.

Thus, the Motion to Reconsider was not a proper use of a 1.904(2) motion, as it was "used merely to obtain reconsideration of the District Court's decision." Id.

Because of the improper use of the Motion to Reconsider, the thirty (30) day deadline by which a Notice of Appeal should have been filed by Campbell was not tolled. In re Marriage of Okland, 699 N.W.2d 260, 265-67 (Iowa 2005).

Campbell failed to toll the thirty (30) day deadline, and the January 2, 2015, Notice of Appeal filed by Campbell falls outside of the time within which the Notice should have been filed (within 30 days of the November 7, 2014, ruling). Because the timeliness of the Notice of Appeal is mandatory and jurisdictional, this Court lacks the requisite jurisdiction. Milks v. Iowa Oto-Head & Neck Specialists, P.C., 519 N.W.2d 801, 803 (Iowa 1994).

BRIEF POINT II.

THE DECREE OF THE DISTRICT COURT IS WELL SUPPORTED BY BOTH FACT AND LAW, AND THE COURT DID NOT ERR IN ITS NOVEMBER 7, 2014, ORDER.[3]

A. STANDARD OF REVIEW

In equity matters, the Appellate Court reviews the findings of a trial court de novo. Baker v. Starkey, 144 N.W.2d 889, 895 (1966).

However, the Court will give weight to the findings of fact of the trial court. Spies v. Prybil, 160 N.W.2d 505, 507 (Iowa 1968).

B. ARGUMENT

The law governing partition actions is well settled both in case law and statutorily.

In 1968, the Iowa Supreme Court recognized a statutory change from a prior preference favoring a partition in kind to a preference for a partition by sale. Spies v. Prybil, 160 N.W.2d 505 (Iowa 1968).

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[3] Due to the difficulty in differentiating the arguments made by Campbell in Brief Points I, II, and III of her brief, Campbell's Brief Points I, II, and III will be addressed collectively.

The Court recognized that the 1943 statutory amendments to the Rules of Civil Procedure established the now-recognized presumption in favor of partition by sale. Id. at 507.

The language of the 1943 amendment remains today:

> Property shall be partitioned by sale and division of the proceeds, unless a party prays for partition in kind by its division into parcels, and shows that such partition is equitable and practicable.

Iowa R. Civ. P. 1.1201(2) (2014) (emphasis added).

The Court referred to the rule as "unequivocal[ly] favoring partition by sale and placing upon the objecting party the burden to show why this should not be done in the particular case." Spies, 160 N.W.2d at 508.

Hence, the law, and presumption in favor of partition by sale, is unequivocal and well-settled. Further, the trial court applied it correctly.

1. The Court appropriately applied the well-settled law favoring partition by sale.

In its Order, the trial court set forth the aforementioned well-established law, which guided its analysis. Appx. pp. 28-

29 (explaining the history of the change to the presumption favoring division by sale) (citing Spies v. Prybil, 160 N.W.2d 505, 507 (Iowa 1968)).

Although Campbell alleges the trial court "erred as a matter of law in applying the burden of proof to partition Campbell to obtain a division in kind," Campbell offers no legal authority to suggest that the burden should not have been on Campbell, or to suggest that an alternative theory of law governs the case.

The trial court, having accurately found that Campbell failed to meet her burden, the reasons for which will be addressed in more detail below, ordered that the subject real estate be partitioned by sale and appointed Behr as Referee to sell the real estate at public auction. Appx. pp. 30-32. This disposition is consistent with the law. Iowa R. Civ. P. 1.1201(2) (2014); Spies, 160 N.W.2d at 507.

2. Campbell failed to meet her burden approving that a partition in kind is practicable.

Having prayed for a partition in kind, in lieu of the partition by sale as desired by Wihlm and Balek, Campbell

must prove by a preponderance of the evidence that a partition in kind is practicable. Iowa R. Civ. P. 1.1201(2) (2014); Spies, at 508.

The Court appropriately determined that Campbell failed to meet her burden.

i. Even Campbell is unsure how much real estate she would need to receive in order to achieve an equitable partition in kind.

Throughout her case-in-chief, Campbell offered and referenced Exhibit 107, which purports to describe a partition of the real estate in kind, and depicts the proposed parcels, which Campbell suggested she should receive as an equitable partition. Appx. pp. 77-78 .

The Court needs to look no further than the second page of Exhibit 107, the attempted depiction of the proposed partition in kind by Campbell, and Exhibit 108, to identify the lack of practicability in the proposal of Campbell.

Exhibit 107 depicts three parcels of real estate that Campbell maintains she should receive in kind as an equitable division of the real estate. Appx. p. 78 .

However, by Campbell's own admission, the amount of real estate necessary to effectuate an equitable partition in kind is unknown.

As depicted on page two of Exhibit 107, in order for an equitable division, Campbell suggests she should receive Parcel III, which she describes as "14.06[acres] +/-."

Thus, Campbell herself is unsure as to the precise number of acres she is to receive in order to acquire a practicable and equitable in-kind share.

ii. Campbell fails to account for extra costs associated with or resulting from a partition in kind.

The impracticability of a partition in kind is further evidenced by Exhibit 108, which again, purports to depict Parcel III.

Campbell has drawn arrows suggesting boundaries would need to be moved in order to achieve her proposed division in kind. Appx. p. 79.

When asked of this imprecision, the following dialogue occurred:

Q: And [Exhibit 107] says 14.06,+/-; is that true?

A: Yes.

Q: So even under your proposal, you're not sure what you are asking the Court for; Correct?

A: It has to be appraised.

Q: It has to be surveyed, you mean.

A: I mean surveyed. Yeah.

Appx. p. 428-29 (Tr. pp. 204-05).

Upon cross examination, Greder, the expert of Campbell, also acknowledged that the proposal of Campbell would require a survey. Appx. p. 419 (Tr. p. 184).

Greder also admitted that, as depicted by Campbell, a fence may need to be installed. Appx. pp. 419-20 (Tr. pp. 184-85).

However, Campbell's proposal fails to factor in such expenses. Appx. p. 420 (Tr. p. 185).

iii. Campbell cannot overcome the differences in the pieces of real estate.

As previously set forth, the real estate desired by Campbell is described and depicted in Exhibit 107.

It includes an acreage (Parcel II), 14.06 +/- additional acres (Parcel III), and the "south sixty," all of which is in Cerro Gordo County. Appx. pp. 77-78.

Thus, under the proposal of Campbell, Wihlm and Balek would have been left two forty (40) acre parcels in Franklin County, and approximately 138.53 (depending on the "+/-" of Campbell's Parcel III) tillable acres in Cerro Gordo County. Appx. pp. 77-78, 307, 310, 311.

Regarding the varying qualities of these parcels, Kuper described them as "comparing apples to oranges." Appx. p. 362 (Tr. p. 95).

When referencing the apples to oranges analogy, Kuper compared the north 160 acres in Cerro Gordo County (described and depicted in Exhibit 24), of which most would be left to Wihlm and Balek under Campbell's proposal, to the sixty acre parcel located adjacently to the south (described and depicted in Exhibit 25). Appx. p. 362 (Tr. p. 95), 323-24. Campbell would have the trial court allocate the sixty acre parcel to her. Appx. pp. 77-78.

The soil types of the separate tracts are described and depicted in soil maps, which the trial court was presented. Appx. p. 323 (the north 160 acres in Cerro Gordo County), Appx. p. 234 (the south 60 acres in Cerro Gordo County), Appx. pp. 312-13(a 40 acre tract in Franklin County), and Appx. pp. 314-15 (a 40 acre tract in Franklin County). These Exhibits reference the CSR and CSR2 values of each parcel.

Behr testified that the CSR values (both CSR and CSR2) described and depicted in Exhibits 15, 16, 24, and 25 are indicators of the quality of soil. Appx. pp. 384-86 (Tr. pp. 130-32).

The higher a CSR or CSR2 value of a parcel, the better quality it is. The CSR of the parcels desired by Campbell are higher than the Cerro Gordo parcel she would allocate to her Wihlm and Balek. Appx. pp. 323,-24. Hence, Campbell is seeking the higher quality parcels in Cerro Gordo County. Compare Exhibit 24 to Exhibit 25.

Not only does Campbell desire the parcel with the higher average CSR and CSR2, she desires the parcel with less

variation within it as well. The soil quality in the sixty acre tract has a range of 70 CSR to 92 CSR. Appx. p. 324.

Meanwhile, the real estate that Campbell would impose upon Wihlm and Balek has a range from 46 CSR to 92 CSR. Appx. p. 325.

Reaffirming the age-old adage that no two acres of real estate are similar, the trial court needed to only review Exhibit 24 to recognize the impracticality and inequity in trying to partition the real estate in kind. Appx. p. 323 (the north 160 acres) has so many variations of soil qualities that the color schematic looks like a three year old's attempt at painting a portrait. Meanwhile, the portrait of the south sixty acres desired by Campbell has less variation as exhibited by the significantly fewer colors. Appx. p. 324 .

In essence, Campbell would have this court turn the schematics into a puzzle and allocate certain pieces to each party while assuring that the allocation is both equitable and practicable.

This simply cannot be done. There is no way to review the colors and draw lines that would ensure each party receives the same of each color (or soil quality).

iv. The division in kind proposed by Campbell would negatively impact the remaining real estate.

Finally, Kuper, an expert who the trial court determined to be creditable[4] explained that carving out the additional fourteen plus or minus acres desired by Campbell would have a detrimental impact on the salability of the balance of the real estate. Appx. pp. 373-75 (Tr. pp. 114-16). Yet, Campbell did not account for the decrease in value of the real estate she would allocate to her siblings.

Simply stated, the proposal of Campbell reflects:

i. Imprecision (evidenced by the "+/-");

ii. Additional expense (the survey and potential fence), for which she did not account;

[4] See Appx. p. 28 ("The Court was impressed by the work done by each of the experts as well as the experts' credentials. All the experts who testified were extremely knowledgeable and experience, and the Court found their testimony to be creditable and helpful.")

iii. The inability to practicably allocate the land equitably among the siblings based on the differing variations in soil type and quality.

iv. A question of whether the allocation of Parcel III to Campbell would result in a lower price for which the balance of the real estate (which would be left to Wihlm and Balek) would be sold.

Certainly, the Court was correct in finding that Campbell failed to put forth a proposal that could be "reasonably capable of being accomplished." Black's Law Dictionary, 1210 (8th ed. 2004) (defining "practicable"). Hence, Campbell failed to meet the burden required of her by Spies. Spies v. Prybil, 160 N.W.2d 505, 508 (Iowa 1968). The trial court accordingly did not err in its November 7, 2014, Order.

3. Defendant failed to meet her burden of proving that a partition in kind would be equitable.

Not only must a party seeking a partition in kind prove that such partition will be practicable, the party must also prove that the division in kind will be equitable. Iowa R. Civ.

P. 1.1201(2) (2014); Spies v. Prybil, 160 N.W.2d 505, 507 (Iowa 1968).

The trial court was correct in finding that Campbell failed to meet her burden.

i. The appraisal relied upon by Campbell was speculative.

In an attempt to attack the trial court's conclusion that relying upon an appraisal to justify a division in kind would be "mere guesswork," Campbell argues that the trial court inappropriately considered a future valuation, rather than a valuation at trial. Campbell's Brief.

This is a mischaracterization of the trial court's conclusions and a mischaracterization of the law.

Campbell references dissolution of marriage appellate decisions in which the Appellate Court has held that the appropriate date of valuation of property subject to the dissolution is the date of trial. Campbell's Brief (citing In re Marriage of Decker, 666 N.W.2d 175, 181 (Iowa App. 2003); In re Marriage of Muelhaupt, 439 N.W.2d 656, 661 (Iowa 1989)).

Campbell offers no law connecting the dissolution of marriage cases to the issue before the bench.

Even if such decisions have bearing on a partition action, any suggestion that the trial court did not comply with such law is inaccurate.

Campbell references the trial court's cursory use of future tense in a sentence in which the trial court questioned whether the partition in kind "will be" equitable and practicable, rather than whether it "is" equitable and practicable as of the date of trial. Campbell's Brief (apparently referencing the trial court's statement "The rule is clear that the Campbell has the burden of proof to show that such partition in kind will be equitable and practicable if a partition by sale is to be denied by the Plaintiff.")

Campbell focuses on one word and ignores the trial court's numerous references to evidence available as of the date of trial, upon which the trial court relied in determining the partition in kind would be "mere guesswork."

The trial court, applying evidence available to it on the date of trial stated, "This Court is not confident that the appropriate and correct values can be assigned to these properties due to the nature and quality of the land involved." Appx. p. 29 (emphasis added). This is not a reference to future concern, but a concern present in the mind of the trial court on the date of trial.

The trial court also acknowledged the volatile nature of farm land, which is affected by current crop prices, and as a result, a partition in kind would be "guesswork" when factoring in the nature and quality of the land at the time of trial. Appx. p. 29.

The trial court did not suggest in its decision that future changes in the quality of land would impact a future valuation, as suggested by Campbell. Rather, the trial court noted that the speculation existing on the day of trial "has made" a partition in kind guesswork. Appx. p. 29.

In its decision, the trial court also relied upon the testimony of Kuper, about which the trial court stated, "Mr.

Kuper also spoke to the Cerro Gordo County north parcel as having much more variation in soil than the south parcel." Appx. p. 26.

This is not a reference to the future varying soil quality or the future consequences of it. Rather, it is a present day fact upon which the trial court relied.

Even the appraiser upon whom Campbell relied in advancing her argument for a partition in kind referenced present day speculation. Appraiser Greder stated, "The market has become a whole lot less predictable. But for every sale that was soft, I can cite you a sale that was surprisingly strong. It's much more dependent now on who wants it." Appx. p. 12 (Tr. p. 174) (emphasis added). Again, these were then-present day conditions, not future concerns.

The trial court relied upon such testimony, as evidenced by the trial court's finding, "Mr. Greder did concede that the market is a whole (sic) is a lot less predictable than in years past." Appx. p. 27 (emphasis added).

Hence, to the extent the dissolution of marriage cases relied upon by Campbell have import here, the trial court unequivocally relied upon facts as of the date of trial to determine that speculation surrounded the use of appraisals existing as of the date of trial.

In short, Campbell confuses speculation on the date of trial as a result of then-present market conditions with future speculation.

In rendering its decision, the trial court appropriately based its decision upon the facts available to it as of the date of trial.

ii. Campbell's slippery slope argument that the trial court's analysis would forever bar the use of appraisals overstates the trial court's decision.

Campbell also advances a slippery slope argument that given the Court's ruling, the use of an appraisal for the purpose of partitioning real estate in kind could never be relied upon by a trial court.

Such argument far exceeds the decision of the trial court, and misstates the trial court's rationale and the law relied upon by the trial court.

The trial court's ruling was specific to the facts presented.

Campbell blurs the trial court's concern regarding the accuracy of appraisals in this case as of the date of trial with the use of appraisals in general.

If the trial court is not permitted to question the accuracy of an appraisal given the then-present day conditions, the trial court would essentially be bound by the appraisals, which were only a few of many facts presented.

Under the rationale of Campbell, the trial court would be required to rely solely on the appraisals, without considering other circumstances.

Such evaluation is contrary to well-settled law.

A fact finder is to consider all evidence presented, and the expert testimony of one expert shall be considered as any other. Crouch v. Nat'l Livestock Remedy Co., 231 N.W. 323

(Iowa 1930) (holding that a jury instruction advising that a fact finder should consider evidence of one expert as any other, is consistent with applicable law.)

In Crouch the Court instructed the fact finder (the jury in that case) that the law does not require the fact finder to "surrender [its] judgment to that of any person testifying as an expert witness." Id. at 324. The Court further held that a fact finder is to reach a conclusion "from the consideration of the whole of the evidence, including the opinions and testimony of experts, and also the substantive facts." Id.

Here, not only would the Campbell have the trial court surrender its judgment to the testimony of one expert or documents generated by that one expert (the appraisals prepared by Greder), Campbell would have the trial court ignore even certain testimony of that sole expert upon whom Campbell desires the trial court rely.

As set forth previously, even Greder, the author of the appraisals upon which Campbell relies, admitted that the

current real estate market is speculative. Appx. p. 412 (Tr. p. 174).

The position of Campbell is, thus, that the trial court should consider only the facts desired by or favorable to Campbell and that the trial court should disregard any other, even if it comes from Campbell's expert.

The trial court, consistent with Crouch, considered all evidence, including the testimony of three experts, Greder, Kuper, and Behr. Regarding the testimony of each expert, and acknowledging the value of each, the trial court noted that is was "impressed by the work done by each of the experts as well as the experts' credentials. All of the experts who testified were extremely knowledgeable and experienced, and the Court found their testimony to be creditable and helpful." Appx. p. 28.

When considering such evidence as a whole, the trial court defined the desired partition in kind as "like taking a shot in the dark." Appx. p. 28.

Not only was the testimony of Greder, upon whom Campbell relied, indicative of the speculative nature of the true value of the real estate, Greder admitted that even appraisers within his firm may have disagreed on the value. During direct examination, and when being questioned about whether a 2013 appraisal (effective November 2012) was still an accurate valuation as of the trial date, Greder suggested the appraisal was an accurate valuation even though other real estate is in decline because Gary Howell, an associate of his firm, was "conservative" in his valuation in 2012, and thus, was too low at that time. Appx. pp. 410-11 (Tr. pp. 171-72).

Thus, not only do appraisers disagree on valuations, in this particular instance, two appraisers within the same firm could not agree on the value of a particular piece of real estate on the exact same date. Appx. pp. 410-11 (Tr. pp. 171-72).

Certainly, then, when the trial court considered all of the evidence put before it, and did not "surrender its judgment to that of a particular expert," as desired by Campbell, the trial court correctly determined that reliance upon an appraisal to partition the real estate in kind would amount to "mere guesswork."

While the trial court found the particular facts before it speculative, never did it suggest that the use of an appraisal would "always" be speculative.

Such characterization by Campbell is a mere attempt to re-characterize the trial court's decision, in an effort to emphasize what she believes to be the wrong outcome.

iii. The significance of the decline in real estate value varies depending on the quality of the real estate.

As of the date of trial, each expert witness agreed that real estate values were in decline. Appx. p. 371 (Tr. p. 112) (Kuper), 381 (Tr. p. 127) (Behr), and 418 (Tr. p. 183) (Greder).

Behr testified that in the year prior to trial, prices state-wide declined by 8.8%. Appx. p. 381 (Tr. p. 127). Land prices in north central Iowa declined 4.5% in the six month period preceding trial. Appx. p. 402 (Tr. p. 150).

Of importance, Greder and Behr also agreed that the decline more significantly impacted poorer quality real estate. Appx. (Tr. p. 183 (Greder)), 402 (Tr. p. 150 (Behr)).

This is important when the Court recognized the quality of real estate desired by Campbell versus that which she would leave to her siblings.

Campbell desires the south sixty acre tract located in Cerro Gordo County. Appx. pp. 77-78, 308, 419 (Tr. p. 184 (Greder)).

As noted above, the sixty acre tract desired by Campbell is of higher quality than that which she allocates to Wihlm and Balek. Compare Exhibit 24 to Exhibit 25 (Appx. pp. 323-24). Because the higher quality soils are less impacted by the decline in prices, the lower quality soil that Campbell would leave to Wihlm and Balek will suffer more, proportionately, as

prices decline. Appx. p. 402 (Tr. p. 150 (Behr)), 418 (Tr. p. 183 (Greder)). In other words, the parcel desired by Campbell will hold its value better than the real estate she would leave to her siblings.

Such a result is inequitable, and contributes to the trial court's description of trying to partition the real estate in kind as "mere guesswork."

iv. Grain prices are volatile, impacting real estate prices.

Another factor contributing to the inequities that would result from partitioning the real estate in kind were the grain prices at the time of trial.

The Court cited the impact of the variance in grain prices in its decision. Appx. p. 29.

Behr testified that the decline in corn prices was drastic. Corn prices of $5.00 or $7.00 per bushel two years ago declined to "$3.23 as of the date of trial." Appx. p. 29. (referencing Behr's testimony).

As reflected in Exhibits 19, 20, 21, and 22, the grain prices drastically declined from June 2014 to the date of trial. Appx. pp. 316-21.

Kuper echoed these facts. He explained the significant impact that the grain prices would have on the price for which the real estate could be sold. Appx. pp. 351-52 (Tr. pp. 82-83).

Kuper acknowledged the decline in grain prices and the anticipated continued decline in real estate prices as a result. Appx. pp. 351-52 (Tr. pp. 82-83).

Accordingly, with the decline in grain prices, the decline in real estate prices will follow, again adversely impacting the poorer quality real estate more significantly than the strong real estate. Appx. pp. 316-21.

On its most basic level, then, the Cerro Gordo real estate desired by Campbell will suffer less of an impact than the real estate she conveniently desires not to retain. This is inequitable.

v. Campbell's calculations overstate the value of the assets Wihlm and Balek would receive under Campbell's proposal.

Behr and Greder testified that the value of good quality real estate has remained strong. Appx. pp. 382, 418 (Tr. pp. 128 and 183).

Behr testified that any real estate having a CSR2 value of 80 or above would be in the top tier (of a three tier system), and thus far, has not been impacted by the sharp decline in real estate values. Appx. p. 382 (Tr. p. 128).

Behr explained that the real estate in the lower tiers has decreased in value, some of which quite significantly. Appx. p. 402 (Tr. p. 150).

Of importance, Parcel I (desired by Campbell) has a CSR value of 81.3 and a CSR2 value of 88.7. Appx. pp. 324, 77-78. Applying these numbers to the uncontradicted testimony of Behr and Kuper, the value of this real estate (that Campbell desires) has likely remained unchanged since the July 2014 valuation by Greder.

Meanwhile, the real estate which Campbell desires to be conveyed to Wihlm and Balek has declined in value pursuant to the testimony of Behr and Kuper, as it has a CSR value of 73.1 and a CSR2 value of 72.5.[5] Appx. p. 323.

The testimony at trial suggested that real estate of medium to low quality has declined significantly. Appx. p. 402 (Tr. p. 150). In fact, the statewide land prices declined 8.8% in the year prior to trial. Appx. p. 381 (Tr. p. 127). In the six months prior to trial, the average decline of prices in north central Iowa was 4.5%. Appx. p. 402 (Tr. p. 150).

Accordingly, Exhibit 107, which sets forth the valuation attributed to the real estate by Campbell in justification of her requested partition in kind, should be updated to reflect the true valuations:

[5] The importance of use of CSR2 versus CSR is again reflected here, as when the more accurate CSR2 value is used, the quality of the Cerro Gordo county real estate Campbell receives increases, while the quality of the real estate Campbell desires to leave to Wihlm and Balek decreases. Appx. pp. 323-24. Thus, the appraisals using CSR to value the real estate misstates the value of the real estate.

TABLE ONE:
REAL ESTATE CAMPBELL DESIRES TO CONVEY TO WIHLM AND BALEK

REAL ESTATE	CSR	CAMPBELL'S VALUATION	CURRENT VALUATION ASSUMING 4.5 PERCENT (4.5%) DECLINE IN OR TO REAL ESTATE OF 79 CSR OR LESS[6]
134.47 acres (148.53 acres of tillable farm ground of the north Cerro Gordo County real estate less 14.06 +/- acres desired by Campbell in Parcel 3)	73.1	**$1,415,969.10** (134.47 x $10,530.00 per acre) *Ex. 107 (Appx. pp. 77-78)*	**$1,352,250.49** (134.47 x $10,056.15 per acre) *Ex. 107 reduced by 4.5% (Appx. pp. 77-78)*
40 acres Section 33 Franklin County	91.9	**$451,000.00** *Ex. 107 (Appx. pp. 77-78)*	**$451,000.00** *No change due to CSR of 80 or more*
40 acres Section 17 Franklin County	68	**$229,900.00** *Ex. 107 (Appx. pp. 77-78)*	**$219,554.50** *Ex. 107 reduced by 4.5% (Appx. pp. 77-78)*
TOTAL		**$2,096,596.10** *Ex. 107 (Appx. pp. 77-78)*	**$2,022,804.99** *Ex. 107 (Appx. pp. 77-78) Adjusted to reflect decline in real estate values.*

[6] This 4.5% downward adjustment is a conservative calculation, as Behr testified that the 4.5% decline was across all real estate, but it was well established that real estate of poor quality suffered more significantly. Appx. p. 402 (Tr. p. 150).

Accordingly, while Campbell would receive an asset which remains unchanged because of the higher quality real estate she desires and is valued by her at $1,048,000.00[7] (Exhibit 107), Wihlm and Balek would each receive an asset of $1,011,402.49 (one-half of the then-current value of the real estate attributed to them accounting for the decease).[8] Thus, because of the larger decline in poorer quality real estate values, Campbell would receive an asset of $36,300.00 higher value than each of her siblings.

vi. Campbell's calculations undervalue the assets Campbell would receive under Campbell's proposal.

The inequity to Wihlm and Balek exhibited by the decline in the real estate that would be conveyed to them under Campbell's proposal is only partially exhibited above. Not only has the real estate Campbell desires to leave to her siblings

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[7] This remains unchanged because the real estate she desires is above 80 CSR and likely has not experienced a drop. Appx. p. 382 (Tr. p. 128).

[8] Campbell testified to potential tax consequences that may be incurred by her if the real estate were sold at auction. However, Wihlm testified that similar consequences would be experienced by Wilhm and Balek. Campbell may avail herself of a tax deferred exchange, which would minimize or eliminate tax consequences. Appx. p. 427 (Tr. p. 202).

declined in value, Campbell admits she undervalued the real estate she would receive under her proposal. Appx. pp. 430-31 (Tr. pp. 206-07).

As will be set forth in more detail below, the sale of the real estate at auction would permit Campbell to purchase the south sixty acre parcel in Cerro Gordo County (desired by her) should she be the highest bidder. Behr testified that if the property were to be sold at auction by him, the parties would be invited to bid along with the general public. Appx. p. 406 (Tr. p. 156).

Further, Behr testified that it would be better to separate the south sixty acre parcel from the remaining real estate. Appx. p. 406 (Tr. p. 156).

Thus, Campbell would have the opportunity to bid on the south sixty acre parcel, preserving her opportunity to acquire it, even if it were sold at auction. Because Behr would sell the south sixty acre parcel separately, Campbell could acquire it without also having to bid on the real estate she does not otherwise desire. Appx. p. 406 (Tr. p. 156).

Yet, Campbell adamantly opposed the sale by public auction, and the inequity of Campbell's proposal is best exemplified by the reasons she refuses to allow the real estate to go to public auction. Campbell admits that she anticipates others outbidding her at public auction. Appx. pp. 430-31 (Tr. pp. 206-07). When questioned by her own counsel the following dialogue ensued:

> Q: Could you explain to the Court what your interest is in proceeding with the division in kind rather than a division by sale.
>
> A. I feel that I would be left out because the strong corporates surrounding our property, money is no object, and they would just outbid me, and I would be sitting with nothing.

Appx. pp . 425-26 (Tr. pp. 197-98).

This was reaffirmed by Campbell during cross examination:

Q. So--so really, what your telling me is your concern is that somebody else may pay more for the 60 acres than you would; right?

A. If they want to bid against me, yeah, I think.

Q. Is that a yes?

A. Yes, yes.

Q. And, consequently, if that were to happen, okay, if somebody else were to bid more than what the appraised value is, okay, then the appraised value you've utilized is incorrect; right?

A. I guess, yes.

. . .

Q. Your concern is that at auction, somebody's going to bid more than you; correct?

A. Yes. They'll run it up.

Q. Run it up more than the appraised value?

A. Yes. Because about three miles north of us, it went for 14--Behr sold some property for 14.

Q. $14,000 an acre?

A. That was in the Globe Gazette.

Appx. pp. 430-31 (Tr. pp. 206-07).

By Campbell's own admission, her reluctance to let the real estate be sold at auction results from her knowledge and confidence that another individual or entity would pay more than she would for the property and more than she has allocated to it based upon the appraisals. Appx. pp. 430-31 (Tr. pp. 206-07).

In other words, Campbell admitted that the value she has assigned to the real estate she would receive ($1,048,000.00 pursuant to Exhibit 107 (Appx. pp. 77-78)), is less than what someone else would pay for the real estate. Hence, it does not reflect the true "fair market value." Fair market value is defined as "the price that a seller is willing to accept and a buyer is willing to pay on the open market in an arm's-length transaction; the point at which supply and demand intersect." Black's Law Dictionary, 1587 (8th ed. 2004).

Thus, if the value attributed to the real estate by Campbell is less than that which someone else would pay, it fails to meet the definition.

The observation of Campbell is particularly true given a number of circumstances addressed by various witnesses at trial.

Behr and Kuper testified that when real estate is auctioned, one factor contributing to how much an individual would pay for the real estate is the "farmability." Appx. pp. 361, 403 (Tr. pp. 94, 151). Kuper further explained that potential fence line buyers are important as they have an incentive to pay more for the adjoining real estate. Appx. pp. 355-57 (Tr. pp. 88-90). A fence line buyer is a person owning real estate adjacent to that which is being sold. Appx. pp. 355-57 (Tr. pp. 88-90).

During his testimony, Wihlm explained to the Court that the Lundt family has expressed an interest in the south sixty acre parcel desired by Campbell (Parcel I pursuant to Exhibit 107). Appx. p. 345 (Tr. p. 59). Consistent with Kuper's

testimony, Exhibit 8 identifies a reason for Lundt's interest in Parcel I. Appx. p. 306. Lundt Farms, LLC owns the real estate immediately to the south of Parcel I desired by Campbell. Appx. pp. 306, 77-78. This interest is consistent with Kuper's testimony that fence line buyers are sometimes willing to pay a premium to acquire real estate adjacent to real estate already owned by them. Appx. pp. 355-57 (Tr. pp. 88-90).

Given the interest of Lundts, who are classified as fence line buyers, as well as the admitted concerns of Campbell that the real estate is worth more than that for which it is appraised, the Court cannot rely upon the numbers allocated to the real estate desired by Campbell as an accurate representation. Thus, and as admitted by Campbell, the values assigned by her fail to state the actual fair market value.

Continuing with the calculations referenced above, if the Court were to appropriately value the real estate to be acquired by Campbell under her proposal by correcting the

admitted under-valuations by her, the value of the real estate that would be acquired by Campbell would more accurately be similar to the following:

TABLE 2:
REAL ESTATE CAMPBELL DESIRES

REAL ESTATE	SHIRLEY'S VALUATION	VALUATION ASSUMING TEN PERCENT (10%) INCREASE BASED UPON EVIDENCE PRESENTED AT TRIAL AND ADMITTED UNDER[9]
Parcel 1 (58.71 acres Cerro Gordo)	$750,000.00	$825,000.00
Parcel 2 (4.4 acres of building site Cerro Gordo)	$150,000.00	$150,000.00 (No change because not tillable farmland)
Parcel 3 (14.6 acres +/-)	$148,000.00	$162,800.00
TOTAL	**$1,048,000.00**	**$1,137,800.00**

Thus, if the Court were to acknowledge the decline in value of real estate Campbell desires that the Court convey to Wihlm and Balek (Table 1 referenced above), and an accurate fair market valuation of the real estate Campbell would receive under her proposal, Campbell would receive an asset worth

[9] The ten percent (10%) increase is used solely for exemplary purposes. However, in Campbell's own words, to the "corporates" surrounding the real estate, money is no object. Appx. pp. 425-26 (Tr. pp. 197-98).

$126,397.51 more than each of her siblings ($1,137,800.00 to Campbell as shown in Table 2 less $1,011,402.49 to each of her siblings as shown in Table 1).

Campbell's proposal is grossly inequitable and fails to satisfy the burden imposed upon her by Spies v. Prybil, 160 N.W.2d 505, 508 (Iowa 1968).

4. A partition by sale protects the interests of all parties.

Of most significance, the desired outcome of Campbell can largely be obtained by her while still protecting the interests of Wihlm and Balek if the property is sold at public auction.

Behr, who the Court appointed as Referee and ordered to sell the real estate,[10] testified that if the property were to be sold at auction, all members of the public, including parties to the litigation, could bid. Appx. pp. 397-98 (Tr. pp. 143-44).

Behr also testified that with respect to the Cerro Gordo County real estate, the south sixty acre parcel, which is desired by Campbell (Exhibit 107) should be sold separate

[10] For reasons set forth below, although Behr testified at trial, Behr does not have a conflict of interest and should not be disqualified as Referee.

from the balance of the Cerro Gordo County real estate. Appx. p. 405 (Tr. p. 155).

With the rest of the real estate being sold, Campbell would be able to utilize her one-third share of those sale proceeds as a payment toward the purchase of the sixty acre parcel desired by her should she be the highest bidder.

The proposed partition by sale would not deprive Campbell of the opportunity to acquire such real estate.

Rather, it would simply ensure that the real estate is sold for its true fair market value. Black's Law Dictionary, 1587 (8th ed. 2004).

This is particularly important in light of the Court's decision in Varnell v. Lee in which the Court held that owners of real estate sold for partition are entitled to the highest price available. Varnell v. Lee, 14 N.W.2d 708 (Iowa 1944).

The trial court's order to sell the real estate by public auction afforded Campbell the opportunity to retain the real estate, while ensuring that the highest price is realized.

Not once did Wihlm or Balek suggest they desire to prevent their sister from acquiring the real estate. In fact, Wihlm advised the Court that he is aware of her ability to bid at public auction, and he offered no objection. Appx. pp. 341-42 (Tr. pp. 39-40).

Rather, and understandably, Wihlm and Balek simply desire that the party purchasing the real estate, which may be Campbell, pay the true fair market value, not the understated value as desired by Campbell.

CONCLUSION

Consistent with applicable law, the trial court, as fact finder, considered the facts in their totality, and did not, as desired by Campbell, look at the appraisal relied upon by Campbell in a vacuum. Crouch v. Nat'l Livestock Remedy Co., 231 N.W. 323, 324 (Iowa 1930).

As set forth above, and as decided by the trial court, the evidence is overwhelmingly in favor of Wihlm and Balek, warranting a partition by sale. Hence, Campbell failed to meet her burden of proof, under which she was obligated to prove

by preponderance of the evidence that her proposed partition in kind would both practicable and equitable. Spies v. Prybil, 160 N.W.2d 505, 507 (Iowa 1968).

BRIEF POINT III.

THE COURT DID NOT ERR IN ORDERING BEHR TO SERVE AS REFEREE.

The Iowa Rules of Civil Procedure provide that a partition by sale shall be carried out by one or more referees appointed by the Court. Iowa R. Civ. P. 1.1210, 1.1219 (2014).

Following trial, and in its November 7, 2014 Order, the Court appointed Behr as Referee. Appx. p. 32.

Campbell alleges Behr's bias in favor of auctions rather than partitions in kind as a reason for his disqualification.

This argument is misplaced, as at the time of his appointment, the determination regarding whether to partition in kind or by sale was already made by the Court, and thus, it is not possible for Behr's alleged bias toward selling, if any, to

impact whether the property should be partitioned by sale or in kind.

Notwithstanding Campbell's advancements that she desires a division in kind, which she claims somehow precludes Behr from serving as referee, such issue is not to be determined by the Referee. Iowa R. Civ. P. 1.1210, 1.2101(2) (2014); Spies v. Prybil, 160 N.W.2d 505, 507 (Iowa 1968) (establishing that the Court decides whether to partition in kind or by sale, not the referee).

Thus, the desired disposition of the real estate by the parties is irrelevant as to the appropriate individual or entity has been appointed to serve as referee.

Further reflecting the lack of bias of Behr in favor of Wihlm and Balek is the fact that Wihlm and Balek did not suggest to the trial court that Behr be appointed as referee. Appx. p. 338 (Tr. p. 28) (asking the trial court to appoint Clear Lake Bank & Trust as referee).

When asked for a preferred receiver or referee, Wihlm requested the trial court name the Trust Department of Clear Lake Bank & Trust Company. Appx. p. 338 (Tr. p. 28).

This appointment was requested because Clear Lake Bank & Trust was appointed as Successor Executor and Successor Trustee of the parties' father's Estate and Trust, respectively. Appx. pp. 338-40 (Tr. pp. 28-30).

Because the parties are entitled to the highest and best price for the real estate given a partition by sale, it would make sense that a well-qualified auctioneer be appointed to serve in such role. Varnell v. Lee, 14 N.W.2d 708 (Iowa 1944).

The sole authority offered by Campbell in support of her allegation that a conflict of interest exists is a federal case discussing the conflict of interest of an attorney in a criminal case.

Defendant makes no connection between such case and the facts before the trial court herein.

Here, Behr is charged with the obligation of carrying out a specific Court Order, including the sale of the real estate

pursuant to the terms of the trial court's November 7, 2014 Order. Appx. pp. 24-33.

Behr's credentials to do so are unquestionable. Behr testified that as a co-owner of Behr Auction Service, LLC, he participates in auctions of all types, including real estate and personal property. Appx. p. 126 (Tr. p. 126).

He further detailed his involvement in such sales, including "arranging the sale, conducting the sale, settling the sale, and all in between." Appx. p. 126 (Tr. p. 126).

When asked how many sales he has participated in the past year, as of the date of trial, he had been a part of thirty farmland real estate sales and five to ten house sales, all of which included north central Iowa real estate with the exception of one. Appx. p. 126 (Tr. p. 126).

Behr has been selling real estate for approximately fifteen years and was preceded in the business by his father, Dennis Behr, who has been in the business for thirty-five (35) or thirty-six years. Appx. p. 126 (Tr. p. 126).

Behr has a four year degree from the University of Northern Iowa and received his Auction Certificate from Worldwide College of Auctioneering. Appx. p. 381 (Tr. p. 127).

Ensuring that all parties would have the opportunity to participate in the purchase of the real estate at a public auction, Behr advised that any individual, including any family member, would have the right to bid at the auction. Appx. pp. 97-98 (Tr. pp. 143-44).

Notwithstanding the request of Wihlm to appoint Clear Lake Bank & Trust as Referee, the Court found Behr to be the most qualified to carry out the Court's Order, and as previously stated, held that all expert witnesses, including Behr, were impressive, sufficiently credentialed, knowledgeable, and experienced. Appx. p. 28.

Simply stated, Campbell has failed to show a "real or seeming incapability between [Behr]'s private interests and [Behr]'s . . . fiduciary duties." Black's Law Dictionary, 319 (8th ed. 2004) (defining conflict of interest).

Behr is qualified, and the Court has been given no reason to suggest a sale at a private auction conducted by him would favor one party over another, or that somehow Campbell would otherwise be prejudiced should he conduct the sale. Thus, the Court did not err in the naming of Behr as Referee.

BRIEF POINT IV.
AWARD OF ATTORNEY FEES ON APPEAL

A. JURISDICTION OF COURT

The Appellate Court has jurisdiction to decide whether a party is entitled to fees incurred as part of the appeal. Beckman v. Kitchen, 599 N.W.2d 699, 702-03 (Iowa 1999) (remanding to District Court for entry of judgment for attorney fees incurred on appeal).

B. ARGUMENT

Iowa Rule of Civil Procedure 1.225 provides that "on partition of real estate, . . . the Court shall fix . . . a fee in favor of Plaintiff's attorney, in a reasonable amount, to be determined by the Court." Iowa R. Civ. P. 1.1225 (2014).

The applicable Rules of Civil Procedure do not limit the award of fees to only those incurred as part of trial.

Further, in its ruling filed November 7, 2014, the trial court did not cap the attorney fees available to Plaintiff's counsel, and consequently, has not precluded the award of Appellate fees to Wihlm and Balek. Appx. p. 30-32.

Wihlm and Balek request that this Court order that the fees incurred by them in this Appeal, as evidenced by the Affidavit of their counsel attached hereto be awarded, consistent with applicable Rules of Civil Procedure and the Court's November 7, 2014, ruling. In the alternative, Wihlm and Balek request this Court remand the matter to the District Court to the limited purpose of awarding Wihlm and Balek attorney fees incurred on this Appeal.

REQUEST FOR NON-ORAL SUBMISSION

Wihlm and Balek request non-oral submission of this matter, as the pleadings, testimony, exhibits, record, and briefs submitted by the parties are both voluminous and

adequately address the issues raised on appeal. Further, this matter involves the application of existing legal principles.

CERTIFICATES OF COST, SERVICE, AND COMPLIANCE

CERTIFICATE OF COST

The undersigned attorney for Plaintiff certifies that the amount actually paid for printing and duplicating the necessary copies of this brief in final form was **$0.00.**

CERTIFICATE OF SERVICE

The undersigned attorney for Plaintiff certifies that on the date referenced below, he filed this Final Brief with the Clerk of the Supreme Court by EDMS and also served two (2) copies of this Final Brief on counsel for the Defendant Campbell at:

Michael G. Byrne
Attorney at Law
119 2nd Street NW
Mason City, Iowa 50401-3105

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 10,531 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14 point Bookman Old Style font.

Submitted and served this 23 day of June, 2015.

HEINY, McMANIGAL, DUFFY, STAMBAUGH & ANDERSON, P.L.C.

By: _____
Collin M. Davison AT0010905
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cdavison@heinylaw.com

ATTORNEYS FOR PLAINTIFFS-APPELLEES

CMD:RS:R:\Davison\Law\Appeal\Clients\Wihlm\Brief\Final.Brief.Wihlm.doc

IN THE IOWA SUPREME COURT

BERNARD J. WIHLM AND PATRICIA M. BALEK, APPELLEES, V. SHIRLEY A. CAMPBELL, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF JOHN JOSEPH WIHLM AND AS TRUSTEE OF THE JOHN JOSEPH WIHLM REVOCABLE TRUST DATED APRIL 2, 2012 AND PARTIES IN POSSESSION, APPELLANT.	**APPELLATE NUMBER 15-0011 ATTORNEY FEE AFFIDAVIT IN CONNECTION WITH APPELLEES' BRIEF**

STATE OF IOWA)
) ss:
COUNTY OF CERRO GORDO)

I, Collin M. Davison, being first duly sworn on oath, depose and state:

1. I am an Iowa licensed attorney.

2. I am a member of and practice with Heiny, McManigal, Duffy, Stambaugh & Anderson, P.L.C.

3. Attached hereto and by this referenced made a part hereof is Exhibit "A."

4. Exhibit A reflects monthly billing statements for the months of January through May 2015 maintained contemporaneously with services rendered by members of our firm.

5. Exhibit A reflects our firm's standard billing rate of each member of our firm: $200.00.

6. Exhibit A reflects services relevant to the matter referenced above rendered by members of our firm on behalf of Bernard J. Wihlm and Patricia M. Balek since Appellant filed her Notice of Appeal.

7. Unless otherwise noted, all services described on Exhibit A were rendered by the undersigned. Those services rendered by Attorney Andrew C. Johnston are denoted with an asterisk (*) following the description.

8. Exhibit A does not include fees for which Bernard J. Wihlm and Patricia M. Balek have already been awarded a judgment by the District Court.

9. An Affidavit in Compliance with Iowa Code section 625.24 (2015) is attached hereto as Exhibit "B."

10. Exhibit A reflects fees incurred by Bernard J. Wihlm and Patricia M. Balek as a result of this Appeal totaling [to be inserted in final brief] since the filing of the Notice of Appeal.

Dated this 23 day of June, 2015.

Collin M. Davison

Subscribed and sworn to by **Collin M. Davison** on this 23rd day of June, 2015.

RACHEL R. GRAY
Commission Number 736871
MY COMMISSION EXPIRES
SEPTEMBER 27, 2017

Notary Public in and for the State of Iowa

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April 1, 2015

PATRICIA M. BALEK
BERNARD J. WIHLM
1627 8TH STREET S.W.
MASON CITY, IA 50401

BILLED THROUGH: 03/31/15
OUR FILE # 09551 00005

MATTER: APPEAL

PROFESSIONAL SERVICES:

03/15	ATTENTION TO AND REVIEW OF ORDER FROM CLERK OF SUPREME COURT, ESTABLISHING 50-DAY DEADLINE WITHIN WHICH PROOF BRIEF OF APPELLANT MUST BE FILED. PREPARATION OF CORRESPONDENCE TO CLIENT.	$50.00
	TOTAL PROFESSIONAL SERVICES	**$50.00**
	PLEASE PAY THIS AMOUNT	**$50.00**

PLEASE REMIT A COPY OF THIS BILL WITH YOUR PAYMENT

THANK YOU

(641) 423-5154

EXHIBIT
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TAX I.D. NUMBER 42-1395412

May 1, 2015

PATRICIA M. BALEK
BERNARD J. WIHLM
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MASON CITY, IA 50401

BILLED THROUGH: 04/30/15
OUR FILE # 09551 00005

MA TER: APPEAL

PR IOUS BALANCE BROUGHT FORWARD:		**$50.00**
PR ESSIONAL SERVICES:		
04/ 15	ATTENTION TO AND REVIEW OF FILINGS BY OPPOSING COUNSEL. PREPARATION OF CORRESPONDENCE TO CLIENTS. PREPARATION OF CORRESPONDENCE TO SCOTT D. BROWN.	$100.00
04/ 15	BEGIN REVIEWING TRANSCRIPT.	$400.00
	TOTAL PROFESSIONAL SERVICES	**$500.00**
PA IENTS:		
04/ 15	PAYMENT FROM BERNARD WIHLM	$25.00 CR
04/ 15	PAYMENT FROM PATRICIA BALEK	$25.00 CR
	PLEASE PAY THIS AMOUNT	**$500.00**

PLEASE REMIT A COPY OF THIS BILL WITH YOUR PAYMENT

THANK YOU

(641) 423-5154

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TAX I.D. NUMBER 42-1395412

June 1, 2015

PATRICIA M. BALEK
BERNARD J. WIHLM
1627 8TH STREET S.W.
MASON CITY, IA 50401

BILLED THROUGH: 05/31/15
OUR FILE # 09551 00005

MA TER: APPEAL

PR IOUS BALANCE BROUGHT FORWARD:			**$500.00**
PR ESSIONAL SERVICES:			
05/	15	REVIEW OF BRIEF BY OPPOSING COUNSEL. BEGIN REVIEWING TRANSCRIPT. OUTLINE OF RESPONSES, INCLUDING ISSUES WITH RESPECT TO STANDARD OF REVIEW AND PRESERVATION OF HEIR.	$500.00
05/	15	EXTENDED RESEARCH REGARDING LACK OF JURISDICTION OF SUPREME COURT DUE TO DELAY IN FILING NOTICE OF APPEAL BY OPPOSING PARTY. PHONE CONFERENCE WITH SCOTT D. BROWN REGARDING THE SAME.	$400.00
05/	15	CONTINUED OUTLINE OF RESPONSIVE BRIEF.	$400.00
05/	15	DICTATE BRIEF POINT 1 AND PART OF BRIEF POINT 2.	$700.00
05/	15	RESEARCH REGARDING BRIEF POINT 2. DICTATE INITIAL PORTION OF RESPONSE TO BRIEF POINT 2.	$500.00
05/	15	ATTEMPT TO OUTLINE POINT OF OPPOSING PARTY, RECOGNIZING THE DIFFERENCE BETWEEN THE THREE, OR LACK THEREOF. STRATEGIZE REGARDING APPROPRIATE MEANS BY WHICH RESPONSE CAN BE GENERATED.	$400.00
05/	15	CONTINUED BRIEF PREPARATION. BEGIN OUTLINING RESPONSE.	$400.00
05/	15	CONTINUED WORK ON REPLY BRIEF. RESEARCH REGARDING ENTITLEMENT OF PARTIES TO PARTITION ACTION TO SELL FOR HIGHEST AND BEST PRICE. DICTATE PART OF RESPONSE. REVIEW TRANSCRIPT FOR EVIDENCE SUPPORTING COURT'S FINDING, AND CONNECTION BETWEEN COURT'S RULING AND EVIDENCE PRESENTED.	$1,000.00
05/	15	EXTENSIVE RESEARCH REGARDING PRACTICABILITY FACTOR COURT HAS TO CONSIDER. BEGIN DICTATING BRIEF, INCLUDING EXTENSIVE SECTION REGARDING FACTS SUPPORTING COURT'S FINDING. BEGIN DICTATING RESPONSE TO ALLEGATIONS THAT COURT INAPPROPRIATELY FAILED TO CONSIDER APPRAISAL.	$1,600.00
05/	15	CONTINUED RESEARCH REGARDING TERMS OF APPEAL. DICTATE REDRAFT OF BRIEF POINT 2, WHICH IS RESPONSE TO NUMEROUS BRIEF POINTS OF OPPOSING COUNSEL GIVEN INABILITY TO DIFFERENTIATE.	$1,200.00
05/	15	RESEARCH REGARDING BRIEF POINT 3 (CONFLICT OF INTEREST) AND DICTATE THE SAME.	$1,200.00
05/	15	DICTATE STATEMENT OF FACTS. DICTATE BRIEF POINT 4. BEGIN OUTLINING DESIGNATIONS FOR APPENDIX.	$1,300.00
05/	15	CONTINUED WORK ON BRIEF. DICTATE BRIEF POINT 4. EDIT STATEMENT OF FACTS.	$600.00

05/ 15		CONTINUE EDITS TO STATEMENT OF FACTS. REDRAFT CERTAIN PORTIONS. CONTINUED RESEARCH REGARDING STANDARDS FOR PARTITION. EDIT BRIEF POINT 2.	$1,200.00
05/ 15		CONTINUED REVIEW OF, EDITS TO, AND REDRAFT OF BRIEF. REVIEW BRIEF FILED BY OPPOSING COUNSEL, AND RE-OUTLINE APPARENT ARGUMENTS TO INSURE RESPONSE TO EACH.	$800.00
05/ 15		OFFICE CONFERENCE WITH CO-COUNSEL TO DISCUSS BRIEF, AND SUBSTANTIVE CHANGES. DRAFT STATEMENT OF CASE. DRAFT BRIEF POINT 4. BEGIN OUTLINE OF DESIGNATION OF PARTS OF APPENDIX.	$1,000.00
05/ 15	*	SUBSTANTIVE REVIEW AND EDIT OF APPELLATE BRIEF; TECHNICAL REVIEW AND EDIT OF APPELLATE BRIEF	$645.00
05/ 15		FINALIZATION OF BRIEF. AMENDMENT OF FACTS. AMEND STATEMENT OF CASE. PREPARATION OF AFFIDAVIT IN SUPPORT OF APPLICATION FOR FEES. CONDUCT FINAL EDIT, INCLUDING MODIFICATION OF SUBSTANTIVE PROVISIONS.	$1,600.00
		TOTAL PROFESSIONAL SERVICES	**$15,445.00**

PA IENTS:

05/ 15	PAYMENT FROM PATRICIA BALEK	$250.00	CR
05/ 15	PAYMENT FROM BERNARD WIHLM	$250.00	CR

PLEASE PAY THIS AMOUNT **$15,445.00**

PLEASE REMIT A COPY OF THIS BILL WITH YOUR PAYMENT

THANK YOU

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June 23, 2015

PATRICIA M. BALEK
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MASON CITY, IA 50401

BILLED THROUGH: 06/30/15
OUR FILE # 09551 00005

MATTER: APPEAL

PREVIOUS BALANCE BROUGHT FORWARD: **$15,445.00**

PROFESSIONAL SERVICES:

06/15	ATTENTION TO AND REVIEW OF REPLY BRIEF. REVIEW APPENDIX TO IDENTIFY MISSING PORTIONS OF RECORD. PREPARE SUPPLEMENTAL APPENDIX. FINALIZE BRIEF.	$1,000.00

TOTAL PROFESSIONAL SERVICES **$1,000.00**

PLEASE PAY THIS AMOUNT **$16,445.00**

PLEASE REMIT A COPY OF THIS BILL WITH YOUR PAYMENT

THANK YOU

(641) 423-5154

IN THE IOWA SUPREME COURT

ERNARD J. WIHLM AND PATRICIA M. ALEK PLAINTIFFS, S. HIRLEY A. CAMPBELL, INDIVIDUALLY ND AS EXECUTOR OF THE ESTATE OF OHN JOSEPH WIHLM AND AS TRUSTEE F THE JOHN JOSEPH WIHLM REVOCABLE RUST DATED APRIL 2, 2012, AND ARTIES IN POSSESSION, DEFENDANTS.	APPELLATE NUMBER 15-0011 ATTORNEY FEE AFFIDAVIT PURSUANT TO IOWA CODE SECTION 625.24

TATE OF IOWA)
) ss:
OUNTY OF CERRO GORDO)

I, **Collin M. Davison**, being first duly sworn on oath, depose and tate:

1. I am one of the attorneys for the Plaintiffs in the matter captioned above.

2. I have no agreement, whether expressed or implied, for the division of all or any part of the attorney fees to be allowed in this action, except with only the law firm by which I am employed.

Dated: 6-23-15

Collin M. Davison

Subscribed and sworn to by **Collin M. Davison** on this 23rd day of June, 2015.

RACHEL R. GRAY
Commission Number 736871
MY COMMISSION EXPIRES
SEPTEMBER 27, 2017

Rachel R. Gray
Notary Public in and for said State

MD:RS:R:\Davison\Law\Appeal\Clients\Wihlm\Brief\Aff.Atty.Wihlm.doc

EXHIBIT
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